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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 2000

CITY OF BELLINGHAM et al.,
Petitioners,

v.

DEAN DEBOER et ux.,
Respondents

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

# Respondents' Brief in Opposition

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## COUNTERSTATEMENT OF THE CASE

This action arises from the City of Bellingham's decision to employ force and threats to "terminate" a contract with the plaintiff, Dean DeBoer[1]. DeBoer was the manager of the City's Bayview Cemetery under a contract for the five - year term of January 1, 1994, through December 31, 1998.

In 1994, it became apparent that certain commissions charged to the City pursuant to the contract had been overbilled; the defendants do not claim that these overbillings were anything other than inadvertent. When they were called to DeBoer's attention, DeBoer reimbursed the City in full.

In January, 1995, the City was engaged in negotiations to terminate its contract with DeBoer. The contract contained a provision for termination for cause, which required the City to notify DeBoer of any alleged breach, following which DeBoer was entitled to 15 days to cure. If DeBoer failed to cure a material breach within that 15-day period, then the contract could be terminated. No exception to this 15-day notice period was provided in the contract.

Toward the end of January, various City officials began to take a different approach to the cemetery situation. A memorandum by the City Finance Director, Lynn Carpenter, shows that Carpenter was frustrated with the City Attorney's advice that the City had a "weak case" for termination of the contract for cause, and she wanted to pursue some other means of termination. Carpenter, together

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[1] Although the defendants suggest in their brief that DeBoer was only a partner in D&M Operating Company, at the time of the actions challenged, DeBoer was the sole remaining partner and, therefore, simply the proprietor of D&M. The defendants knew this and have admitted, in their counterclaim, that DeBoer was the owner of D&M.

with a City Councilman and representatives of the City Attorney's office, went to the City police department and requested that the police commence a criminal investigation of DeBoer and obtain a search warrant to seize DeBoer's business records as evidence in the investigation. They were ultimately unable to obtain a search warrant, as the prosecutor would not even present the application and advised them that they lacked probable cause.

Despite the lack of a search warrant or any other form of compulsory process, on January 31, a group of City officials, including two police officers[2], went to the cemetery bearing a letter authorized by the City Council and signed by the Mayor, Finance Director, and City Attorney. The letter advised DeBoer that all of his records and equipment "of whatever nature" were being seized, and that the contract was being terminated immediately--an obvious breach of the 15-day termination provision of the contract. DeBoer was told that if he attempted to return to the cemetery, he would be arrested. His records were taken and used in the criminal investigation, without a warrant, and the City never provided DeBoer the proper notice and opportunity to cure called for by the contract.

## REASONS FOR DENYING THE WRIT

### I. The Court of Appeals Decision is Limited to its Facts

The decision of the Court of Appeals is of limited precedential value as to the question of which petitioners seek review. This is so for two reasons. First, the decision is a

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[2] As the petitioners note, none of the petitioners were physically present at this event. Rather, they directed that others carry out the summary eviction and seizure. Plaintiffs elected to sue those responsible for these decisions rather than those who were ordered to carry them out.

split decision, with no majority opinion; second, the factual setting is highly unusual and idiosyncratic.

Although the petitioners refer repeatedly to the "majority" opinion of the Court of Appeals, they ignore the fact that, as to the issue whether a property interest existed of which DeBoer was deprived without due process, the two judges in the majority, Takasugi and Tashima, though in agreement as to the result, were in complete disagreement as to the reasoning by which that result was reached. Judge Takasugi concluded that a property interest existed in the contract because the contract conferred rights upon DeBoer which were terminable only for cause; Judge Tashima concluded that the contract created a property interest because it was analogous to a contract of employment; Judge Canby, dissenting, disagreed with both and would have ruled that there was no property interest. Accordingly, on the subject of existence of a property interest in a contract with a municipality, neither Judge Takasugi's opinion nor Judge Tashima's opinion are in themselves authoritative as neither commanded a majority of the panel.

The importance of the decision as precedent is, in any event, minimal in light of the extraordinary and bizarre factual pattern presented. In this case, the deprivation was effected when the individual City defendants, faced with what their counsel had described as a "weak case" for breach of contract, chose to step entirely outside of the contract and use their police force to expropriate the plaintiffs' assets and bring about by force a remedy they could not have obtained by following the termination provisions of the contract: the immediate physical ejection of DeBoer from the cemetery, the confiscation of his property, and the commencement of a criminal investigation. These facts sharply distinguish the present case from a claim that a mere garden-variety breach of a municipal contract somehow rises to the level of a violation

of the Due Process clause; and, as we shall discuss, the ruling rests upon no such proposition. The likelihood that any other municipality would ever engage in similarly culpable conduct is small, and so the Court of Appeals ruling not only is limited to its facts by the split panel decision, but is limited to a particularly extraordinary set of facts. The defendants greatly overstate the consequences of this ruling.

**II. There is no Conflict Between this Decision and San Bernardino Physicians' Services.**

Petitioners urge the Court to grant the Writ on the basis that the panel decision here conflicts with the decision in San Bernardino Physicians' Services Medical Group v. San Bernardino County, 825 F.2d 1404 (9th Cir. 1987). We would point out, initially, that the Ninth Circuit Court of Appeals perceived no such conflict, as the Motion for Rehearing En Banc was denied.

The decision in San Bernardino is distinguishable on multiple grounds. First, the conflict between the parties there had only the ordinary attributes of a conventional contract dispute; while the plaintiffs attempted to couch their breach of contract claims in terms of deprivation of property interests in order to lend a constitutional flavor to the dispute, it is quite evident that there was nothing more than a contract dispute at the heart of the matter, see 825 F.2d at 1406. The manner in which these breaches were committed, too, was nothing extraordinary; the defendant, though allegedly in willful breach, had neither employed resources uniquely available to government nor taken any forcible action against the plaintiff. The contract, as the court found, was not analogous to an employment contract as it was merely an agreement to provide the services of others, 825 F.2d at 1409. The court, far from purporting to hold that a contract with a municipality never gives rise to a property interest protected by the due

process clause, made it clear that its holding was limited to the facts before it, stating:

> "We do not rule that a corporation can never avail itself of section 1983 to protect its purely contractual rights; we are unable to anticipate every type of contract to which a corporation or similar entity might be party."

825 F.2d at 1410. The DeBoer ruling does not conflict with San Bernardino; rather, it explores a quite different contract, under facts involving a quite different sort of "deprivation," and arrives at a different result which, like that in San Bernardino, is of rather narrow precedential value. Although Judges Takasugi and Tashima disagreed upon the manner in which San Bernardino was distinguishable, it is clear that both found the two cases analytically distinct.

What the defendants attempt to depict as a clear and frank conflict is, in fact, only a difference in result between two cases which apply similar principles to extremely different factual scenarios. No conflict calling for the exercise of the Court's jurisdiction is presented here.

**III. The Defendants' Portrayal of the Issues Presented is Inaccurate; Their Conduct was Plainly Unconstitutional.**

The defendants attempt to portray the Court of Appeals' decision in these terms: that the Court of Appeals has held that, by virtue of a municipality's status as a "state actor," all municipal breaches of contract constitute deprivations of property without due process of law. This decision, so the portrayal goes, "constitutionalizes" and "federalizes" every dispute over every municipal contract and threatens to bring the full range of remedies available under 42 U.S.C. §1983 upon the head of any municipality or municipal official involved in what otherwise would be a mere

state-law contract dispute. The problem with this portrayal is that the Court of Appeals ruling does no such thing.

We think it is beyond dispute that the fact that a municipality is one of the parties to a contract cannot, by itself, convert the breach of that contract from a state-law wrong to a deprivation of property without due process of law addressable under the Fourteenth Amendment[3]. Whether the reason that this is so in any particular case is that the contract language at issue does not create a species of property protected by due process, or because the mere act of ordinary breach does not constitute a "deprivation" within the meaning of the due process clause, or because the presence of a post-deprivation remedy in the form of an action for breach provides all the process which is due is, for present purposes, unimportant. The fact is that the Court of Appeals' decision does nothing to erode the obvious principle that a mere municipal breach of contract does not, in itself, violate due process.

As we have pointed out, the two judges in the majority, Takasugi and Tashima, differed in their approach to

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[3] The petitioners state at p. 21 of their brief that Medical Laundry Service, Inc., v. Board of Trustees of the University of Alabama, 840 F.2d 840 (11th Cir. 1988) and G&G Fire Sprinklers, Inc. v. Bradshaw, 136 F.3d 587 (9th Cir. 1998) both hold that a mere municipal contract dispute creates a claim under §1983. Neither of these cases, nor any case we know of, so holds. The opinion in Medical Laundry Services did not reach the issue, see 840 F.2d at 842, fn. 2, and after further proceedings and appeal, plaintiff's claims were dismissed as constituting a mere state-law breach of contract, see Medical Laundry Services v. Board of Trustees, 906 F.2d 571, 573 (11th Cir. 1990). In G&G Fire Sprinklers, the Court of Appeals specifically noted that the plaintiff's claims were based upon a challenge to the constitutionality of a statute, not upon breach of contract, see 136 F.3d at 596.

the question whether plaintiffs' due process claim should be reinstated. The Petition for Certiorari restricts its criticism to Judge Takasugi's opinion, and so we address that criticism here[4].

Although the defendants suggest that Judge Takasugi's opinion places municipalities at a special disadvantage in contract disputes because they are held to Fourteenth Amendment due process standards while private parties are not, the fact is that the analysis applicable to this case is identical with that which would apply to a similar case involving the use of improper procedures to terminate a purely private contract. The plaintiffs here have not sought any special status on the basis that the contract at issue is one with a municipality. Rather, plaintiffs have always asserted simply that they hold an interest in the contract, just as they would in any contract, private or public, and that that interest was taken from them through a procedure which was unaccompanied by any procedural safeguards--to wit, that the City Council, Mayor, Finance Director, and City Attorney, without notice or hearing, ordered the police and other municipal employees to summarily carry it out.

It is clear that purely private contractual interests constitute property which is protected by the due process clause; the interests at issue in Fuentes v. Shevin, 407 U.S.

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[4] We would point out, however, that Judge Tashima's reasoning, resting upon the view that the contract here at issue, though technically one creating an "independent contractor" status rather than "employee" status, was sufficiently similar to a conventional contract of employment to be analyzed under principles applicable to government employment cases, is consistent with this court's view, expressed in O'Hare Truck Service v. City of Northlake, 518 U.S. 712, 721-723, 116 S.Ct. 2353, 2359, 135 L.Ed.2d 874, 883-885 (1996), that substantive constitutional rights should not generally turn upon the formal state-law distinction between independent contractors and employees.

67, 92 S.Ct. 1983, 32 L.Ed. 2d 556 (1972), as well as those arising in the many prejudgment attachment and replevin cases decided by this Court, arose out of purely private transactions under state contract law. It is clear, under Fuentes, that although the state may provide procedures by which the holders of these private contractual interests may be judicially deprived of them, and by which those judicial deprivations may be physically enforced, those procedures must meet minimum due process standards. It is, further, clear that not only the public agency which carries out the deprivation but also the private party which employs unconstitutional procedure to induce the agency to carry out the deprivation are potentially liable for that deprivation under §1983, see Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982).

The present case involves nothing more than a deprivation through unconstitutional means of the subject matter of a contract addressable under the same principles applicable to Fuentes and Lugar. What makes the present action unusual is that the municipal agency involved, the City of Bellingham, acted in both the "private" and "public" capacities contemplated by those rulings. The City was the party to the contract which sought to use summary procedure to "terminate" its contract by force, and is liable for invoking that procedure under Lugar; at the same time, the City was the agency which approved and carried out that summary procedure, and is therefore liable under Fuentes. If the City had merely breached the contract by failure to make payment, or by unreasonably refusing to accept cure of its claims that DeBoer had breached, but had never employed its police power to carry out its wishes, it would neither have solicited nor implemented an unconstitutional deprivation, and its actions, however wrong under contract law, could not form

the subject of a claim for deprivation of due process; but it did both, and is liable for both.

The defendants here wished to terminate their contract with DeBoer, and the agreement itself provided the process which they were to follow in such a termination. They are in the situation in which they now find themselves not because they elected to pursue their contractual remedies and were met with a due process claim, but because they found their contractual remedies unsatisfactory and decided to step outside of the contract. They were unhappy, having been advised that they had a "weak case" for breach of contract, and suddenly realized that they had at their disposal something most people don't: a police force. They did not need mere contract remedies; they could fashion their own extracontractual remedy by sending an armed posse down to the cemetery to "terminate" the contract vigilante-style. This they did, and the Court of Appeals found--in a holding unchallenged on this petition--that their conduct was an "egregious" violation of the Fourth Amendment.

It takes some chutzpah to argue, in the face of these facts, that the court was wrong to permit the plaintiff to seek anything other than a conventional contract remedy. Had the defendants pursued their contract remedies, there would be, and could be, no due process claim; now, having discarded their contract remedies, egregiously overstepped the limits of their contractual rights, and employed their police power to carry out by force what they could not carry out by law, they cry "foul" because the plaintiff and the Court of Appeals characterize these unlawful summary actions as something more than a breach of contract. But just as one who seeks equity must do equity, one who seeks to limit his adversary to contract remedies must limit his breaches to the contract.

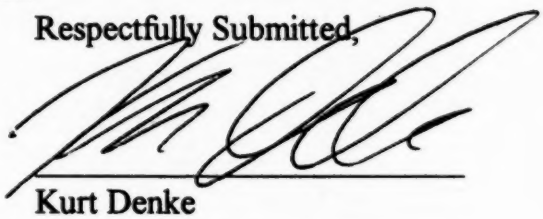
There is a very real and meaningful difference between a deprivation effected by the application of the raw coercive

power of the state and one effected by the mere failure to conform to contract obligations, and it is that distinction which makes this set of facts more than a mere breach of contract. The City's employment of police officers is the exercise of a public trust, in which the state reserves to itself, subject to constitutional limits, the right to use force for the greater good of protecting public order and enforcing the laws. But the defendants, faced with contract termination talks in which they had little leverage, saw their police differently. They saw only that they had armed men in their employ who could be put to use in this contract dispute to provide them an overwhelming, terrifying advantage. Their act of sending out an armed band to threaten the plaintiff and expropriate his property was a shameful and cowardly abuse of their authority, unaccompanied by any procedural safeguard. This wrong extended well outside the realm of mere breach of contract, and the Court of Appeals did not err in so ruling. The Writ should be denied.

## CONCLUSION

For the reasons set forth above, plaintiffs/respondents, Dean and Luanne DeBoer, request that the Court deny the Petition for Writ of Certiorari.

Respectfully Submitted,



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